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Nova Ratione

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PHILIPPIKA
Altertumswissenschaftliche Abhandlungen
Contributions to the Study of Ancient World Cultures 72

Harrassowitz Verlag

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Altertumswissenschaftliche Abhandlungen
Contributions to the Study
of Ancient World Cultures

Herausgegeben von/Edited by
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72

2014
Harrassowitz Verlag · Wiesbaden

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Bis Band 60: Philippika. Marburger altertumskundliche Abhandlungen.

Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.dnb.de abrufbar.

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the internet at http://dnb.dnb.de.

For further information about our publishing program consult our website http://www.harrassowitz-verlag.de

Printed on permanent/durable paper.
Printing and binding: ⊕ Hubert & Co., Göttingen
Printed in Germany
ISSN 1613-5628
ISBN 978-3-447-10219-3

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certain that they would ever arise. The latter was not possible with the traditional civil law novation. In this sense Aquilius Gallus abstracted from the present and generalised.

The contributions in this volume demonstrate that in the two or three centuries of the transition from Republic to Principate Roman culture and society underwent in any case some fundamental changes, entailing great consequences for the law. Changes occurred in several areas: philosophy, society, economy, or more specifically, by the expansion into the Mediterranean, Rome becoming an empire, the Romans becomes a ruling class, acquiring immense riches through the conquests and expilation of the provinces, by the contact with Greece and Greek philosophy in the broad sense, the waning of Roman religion under the influence of eastern religions and the imperial cult, by the disappearance of the aristocratic regime and with it the importance of family ties in the civil wars and the rise of the cloaked monarchy, by the decline of the patriarchic family structure, etc. Since law was for the Romans since in any case the days of Q. Mucius Scaevola not just the art to apply justice correctly, but also, and more, also a science of *ius* and *iustitia*, covering human life, it is here that we find these paradigmatic changes reflected.

The *nova clausula Iuliani* – a change of paradigm in the praetorian law of succession?[1]

Ulrike Babusiaux

The Roman jurists are said to have been traditionalists[2], which at first may seem to contradict the idea of scientific revolutions[3]. There may have been however certain shifts of paradigms within the classical Roman law. Yet, trying to identify a few examples of such changes can be a difficult task as our knowledge of the Roman Law developed in the first and second century AD depends on sources that have only been written (Ulpian) in the third century AD and were compiled in the sixth century AD (Justinian). However, when taking into account Diderot's saying: 'Scepticism is the first step on the road to philosophy[4]', we may still be able to detect important historical upheavals and try to figure out, if they implied legal changes.

A basic definition might be the first useful step: I define 'paradigm' as a principle or basic assumption within the legal decision process, and 'change of paradigms' in Roman law as a new way of thinking or a new view on a given problem, which is of consequence for other legal problems in the aftermath.

The most visible and perhaps the most important legal change within the principate is the so-called 'codification' of the praetorian edict[5]. One of the most

1 All my thanks to my assistants, Teresa Rudolph and Alexander Wherlock, for their linguistic and stylistic assistance during the preparation of this article.

2 See D. Nörr, Zum Traditionalismus der römischen Juristen, in: Festschrift für W. Flume zum 70. Geburtstag, Köln 1978, 153 n. 2 (= Historiae Iuris Antiqui, T.J. Chiusi, H.-D. Spengler, W. Kaiser (edd.), II, Goldbach 2003, 1119 n. 2). This idea might go back to R. v. Jhering, Geist des römischen Rechts I, Leipzig 1907[6], 332–340 (see Nörr, cit. note 2, 1120 n. 4). Reflexions on terminology in Nörr, cit. note 1, 1120f: "Festhalten an Überlieferung".

3 On change of paradigms see Th. Kuhn, The structure of scientific revolutions, Chicago 1962, 135f who underlines the invisibility of these revolutions. For exceptions to the Roman traditionalism such as the idea of *ius novum* cf. see again Nörr (note 1) 1119 n. 3.

4 D. Diderot, Pensées Philosophiques, La Haye 1746, XXXI: "Ce qu'on n'a jamais mis en question n'a point été prouvé. Ce qu'on n'a point examiné sans prévention, n'a jamais été bien examiné. Le sceptisme est donc le premier pas vers la vérité."

5 On the changing history of research on this topic see K. Tuori, Ancient Roman lawyers and Modern Legal Ideas. Studies on the impact on contemporary concerns in the interpretation of ancient Roman legal history, Frankfurt a.M. 2007, 136–167.

famous jurists of this time, Julian, is said to have prepared a definite version of this jurisdictional announcement, one, that would no longer be promulgated for only one year (*edictum tralaticium*) but for ever *(edictum perpetuum)*[6]. There are good reasons to assume that this reform, initiated by Hadrian, was a restatement of existing law and not a legal revolution[7]. However, there is one provision in the edict that was later seen as an innovation and was said to have been added by Julian. This modification is known as the so-called *nova clausula Iuliani*. The first evidence of this edictal addition is in a text written by Marcellus, who was a contemporary jurist of Julian, and might have been slightly younger than him[8]:

> D. 37.8.3 Marcell. 9 dig. (...) *id caput edicti, quod a Iuliano introductum est, id est ex nova clausula,* (...)
>
> '(...) this head of the edict, which was introduced by Julian, that is, in accordance with the new section, (...)'

There has been a lot of criticism and doubt regarding the authenticity of this addendum (*id est nova clausula*). Even the most cautious scholars still considered it to be a gloss[9]. Their main argument is that the explanation does not introduce

6 For an analysis of this term see F. Pringsheim, Zur Bezeichnung des Hadrianischen Ediktes als edictuum perpetuum, in: Symbolae Lenel, Leipzig 1931, 1–39.

7 See M. Kaser, Zum Ediktsstil, in: Festschrift Schulz, II, Weimar 1951, 66; A. Torrent, La 'ordinatio edicti' en la politica juridica de Adriano, AHDE 53 (1983) 17–44 (= BIDR 86/87 (1983/84) 37–63); F. Wieacker, Studien zur Hadrianischen Justizpolitik, in: Romanistische Studien, A. Ehrhardt e.a (edd.). Freiburger Rechtsgeschichtliche Abhandlungen 5 (1935) 43–81; D. Mantovani, L'édit comme code, in: La codification des lois dans l'antiquité. Actes du Colloque de Strasbourg, E. Levy (ed.), Paris 2000, 257–272.

8 With regard to the edict de coniugendis see also J. Burillo, Sobre la 'collatio emancipati', SDHI 31 (1965) 206. In general, the relationship between Ulpius Marcellus and Salvius Iulianus has to be examined, since Marcellus appears to have been criticising Julian very harshly, especially in his *Notae ad Iuliani Digestorum libros XC* (cf.: D.4.4.11.5 Ulp. 11 ad ed. ... Iulianus ... *sic loquitur... Marcellus autem apud Iulianum notat*; D. 13.4.2.7 Ulp. 27 ad ed. ... *et Iulianus scribit... Marcellus autem et alias tractat et apud Iulianum notat posse dici....*; D. 15.1.9.8. Ulp. 29 ad ed. ... *Iulianus ... scribit. Marcellus autem... melius esse ait...*; D. 16.1.8.2 Ulp. 29 ad ed. ... *Iulianus scribit. ... Marcellus autem notat esse aliquam differentiam ...;* D. 37.4.17 Ulp. 35 ad Sab. ... *et ita Iulianus scripsit. Marcellus autem ait iniquum sibi videri* ...; D. 42.4.3pr. Ulp. 39 ad ed. ... *et ait Iulianus ... Marcellus autem notat perquam iniquum esse eum...*). See J. Raststätter, Marcelli notae ad Iuliani digesta, Freiburg 1980.

9 See E. Bund, Salvius Iulianus, Leben und Werk, in: ANRW II.15, Berlin/New York 1976, 125f. An even more radical opinion can be found in C. Cosentini, Breve nota sull'origine dell' 'edictum de coniugendis cum emancipato liberis eius', in: Studi Solazzi, V. Arangio-Ruiz (ed.), Napoli 1949, 221, for counter-arguments see A. Berger, Due note su Salvio Giuliano, in: Studi Albertario I, V. Arangio-Ruiz, G. Lavaggi (edd.), Milano 1953, 619–621 and F. Serrao, Il giurista Salvio Giuliano nell'iscrizione di Thuburbo maius, in: Atti del Terzo congresso internazionale di Epigrafia greca e latina, Roma 1959, 410–411. For authenticity see also A. Caballé Martorell, La collatio emancipati, Madrid 1997, 145–146, who emphasises the juristic quality of the edict.

anything new. This opinion is based on an out-dated view on the writing style of Roman jurists. We are nowadays more inclined to accept that their texts are not continuously brilliant and may even contain superfluous clarifications and descriptive additions[10]. Furthermore, this hypercriticism does not take into account the argumentative function of Marcellus' reference to Julian: As will be pointed out at a later stage, Marcellus uses the *clausula nova* introduced by Julian as a basis for an analogy. The persuasive power of the analogy is even greater, when linked to another jurist, who was even a greater authority[11]. In my opinion, the descriptive addition *quod a Iuliano introductum est, id est nova clausula* is not a gloss but a stylistic device used by the classical jurist, who intended to show that there is a new, and hitherto unknown solution to the discussed problem. If we accept this, we can easily identify the *nova clausula Iuliani* with the help of the so-called edict: *de coniugendis cum emancipato liberis eius*[12]. The text of this edict can be found in two sources, the Pomponius' commentary to the praetorian edict and the edictal commentary of Ulpian.

> D. 37.8.1pr. Ulp. 40 ad ed. *Si quis ex his, quibus bonorum possessionem praetor pollicetur, in potestate parentis, cum is moritur, non fuerit, ei liberisque quos in eiusdem familia habuit, si ad eos hereditas suo nomine pertinebit neque notam exheredationis meruerunt, bonorum possessio eius partis datur, quae ad eum pertineret, si in potestate permansisset, ita ut ex ea parte dimidiam, reliquam liberi eius hisque dumtaxat bona sua conferat.*
>
> 'If any of those to whom the praetor promises *bonorum possessio* were not in parental power at the time of the testator's death, if the estate shall belong to them in his name and they have not been deservedly disinherited, *bonorum possessio* is given to [an emancipated son] and the children he had in his family of that share which would belong to him if he had remained in power throughout in such a way that [he takes] half that

10 In this case, it is not necessarily superfluous, but explanatory. Marcellus does make use of *id est* also in other contexts, cf. D. 8.5.11 Marcell. 6 dig.; D. 12.3.8 Marcell. 8 dig.; D. 34.9.6 Marcell. 22 dig.; D. 45.1.94 Marcell. 3 dig.; D. 46.3.68 Marcell. 16 dig.

11 With regard to *argumentum auctoritatis* see E. Stolfi, 'Argumentum auctoritatis', citazioni e forme di approvazione nella scrittura dei giuristi romani, in: Tra retorica e diritto. Linguaggi e forme argomentative nella tradizione giuridica, A. Lovato (ed.), Bari 2011, 85–135.

12 All translations of the Digests are inspired by translations of The Digest of Justinian, translation edited by A. Watson, Philadelphia 1998^2; the translations of Gaius are those of F. De Zulueta, The Institutes of Gaius, I, Oxford 1946.

share and his children the other half, provided he brings his own property into contribution with them.'

D. 38.6.5 pr. Pomp. 4 ad Sab.: *Si quis ex his, quibus bonorum* possessionem *praetor pollicetur, in potestate parentis, de cuius bonis agitur, cum is moritur, non fuerit, ei liberisque, quos in eiusdem familia habebit, si ad eos hereditas suo nomine pertinebit neque nominatim exheredes scripti erunt, bonorum possessio eius partis datur, quae ad eum pertineret, si in potestate permansisset, ita, ut ex ea parte dimidiam habeat, reliquum liberi eius, hisque dumtaxat bona sua conferat.*

'If any of those to whom the praetor promises *bonorum possessio* have not been in the power of the father whose property is in question at the time of his death, *bonorum possessio* is granted to him and any children he shall have in the family of the deceased, provided that the estate shall belong to them in his name and they have not been expressly disinherited of the portion which would belong to him had he remained in power; and so he takes half that portion, and his children, the remainder, and he brings his own property into contribution with them.'

Even though these two texts differ[13], they are still in concordance when looking at the addressed matter[14], as they both state that with regard to *bonorum possessio*, which is the praetorian law of succession, the emancipated son is joined to his children, who have been left in the family, i. e. under the power of the *pater familias* (his father, their grandfather).

Just a few preliminary words to explain the situation: There is a father (*pater*), who has one or more children. Let them for example be three sons. One of the sons has had two male children, so two grand-sons of his father. Now the grandfather emancipates the son, who is himself a father, but keeps the grandsons in his power. When the grandfather dies, the children (in-power of the grandfather) and the emancipated son (their father) get into a dispute about the inheritance. There is no doubt that the three sons are to be treated equally, since they are siblings and according to the *ius civile* as well as the *ius honorarium* they inherit *per stirpes* (by

13 The differences are partly reflected in the compilers' placement of the two texts: D. 37.8.1pr. Ulp. 40 ad ed. can be found under the heading: *De coniugendis cum mancipato liberi eius* (D. 37.8.) and may refer only to the *bonorum possessio contra tabulas*, whereas D. 38.6.5pr. Pomp. 4 ad Sab. is placed under the heading: *Si tabulae testamenti nulla extabunt, unde liberi* (D. 38.6.) and therefore refers to the *bonorum possessio ab intestato*.

14 Variations can be observed in *exheredatio*; for further details see P. Moriaud, De la simple famille paternelle, Genève 1910, 206–208, who rightly points out that the sons left in power should not be disinherited *nominatim*, if they want to profit from the edict *de coniugendis*.

branch)[15]. But the son, who has been emancipated and who has children of his own left under the power of his father (their grandfather), has to share his part with these grandsons. As a consequence, the first and the second son will get one third each, whereas the share of the third son has to be divided between him and his children. Therefore, he will only get a sixth of the sum and his children a twelfth respectively.

In order to figure out if the *nova clausula Iuliani* was an important or even a paradigmatic change in the Roman law of succession, its content will first be described and analysed in connection to the edicts on *bonorum possessio* (1). In a second step the purpose of the clause will be dealt with, meaning that the problem which Julian intended to solve will be analysed (2). This will lead the focus to the main question of this paper: Does the *nova clausula Iuliani* mark a turning point in the praetorian law of succession or is it just another edict on *bonorum possessio*? (3)

1. Analysis of the Edictal Announcement

The analysis of the edictal text will follow the Pomponian text (D. 38.6.5 pr. Pomp. 4 ad Sab.)

1.1. The edictal addressee

The addressees of the edict are those, to whom the praetor already promised *bonorum possessio: si quis ex his, quibus bonorum possessionem praetor pollicetur*. Hence, the edict has to be qualified as an annex to other edicts on *bonorum possessio*. In connection with the edict *de coniugendis cum emancipato liberis eius*, the *bonorum possessio* can be limited to two types: The *bonorum possessio contra tabulas* and the *bonorum possessio ab intestato*.

The *bonorum possessio contra tabulas* is given to the children, especially the sons, who have been passed over, which means that they have neither been appointed heirs nor been disinherited[16]. The *ius civile* (civil law) invalidates a testament, in which the son (in power) has not been properly disinherited, i.e. by naming him personally. The praetorian law on the other hand is not able to invalidate a testament, but the praetor can still give *bonorum possessio* to all those children who have not been properly disinherited. This help is especially valuable for those who are not protected by the civil law, i. e. the children who are no longer under parental power. Overall this means that our edict deals with the emancipated children.

15 Cf. D. 37.4.1.1 Ulp. 39 ad ed. *Vocantur autem ad contra tabulas bonorum possessionem liberi eo iure ordine quo vocantur ex iure civili.* On this see J.C. Bluntschli, Entwicklung der Erbfolge gegen den letzten Willen nach römischem Recht, Bonn 1829, 83–84.

16 Cf. Inst. 3.13.3pr.–3.

The *bonorum possessio ab intestato* applies where there is no testament present or where it is invalid according to the rules of civil law. It should be noted, that ignoring a son (in power) can also constitute another reason for the invalidity of a testament. Therefore, the *bonorum possessio ab intestato* is normally applied in cases in which the son in power has been left out; however, for any other child (and for the *emancipatus*), it is the *bonorum possessio contra tabulas* that applies. The order in which the legal heirs can inherit is laid down in more than one edict. It is left to the praetor to determine who may be admitted to *bonorum possessio* and which procedural rule must be followed. If no one of the first class applies for *bonorum possessio*, the second class will be entitled to request it and so on and so forth. Both types of *bonorum possessio* establish an order of succession, meaning that both define the rules of entitlement and application. Also, the first class beneficiaries are for both types of *bonorum possessio* the children of the deceased. Importantly, children are defined here as not solely children in power or *sui heredes* but also as all children born under the deceased, meaning all his natural children[17]. As a consequence, and contrary to civil law (*ius civile*), there may be a conflict between the emancipated son and his own sons (the grandsons of the deceased) who remained in the power of their grandfather, about who will benefit from the estate[18]. It may be astonishing to think about such a situation. However, we have to realise that this is not an exceptional situation but one that was encountered very frequently according to our sources.

1.2. The emancipation of a son while keeping the grandson-in-power ...

There are many examples in the Digest where the father emancipates a son and keeps the son's children in his power (*patria potestas*)[19]. Whereas initially (at the time of the XII tables) the *emancipatio* appears to have been a punishment of an ungrateful son[20], in classical times it seems to have been a method to allow commercial activity. A son, sent away from his home in order to do business on his own, became emancipated, so that losses and profits were allocated to him, not to his father[21].

17 For *bonorum possessio contra tabulas* cf. D. 37.4.1 Ulp. 39 ad ed.

18 Slightly different V. Arangio-Ruiz, Istituzioni di diritto romano, Napoli 1960[14], 540 who thinks that the edict aims to protect the other siblings: "in questo caso, ad una sola stirpe finivano per essere assegnato due quote. Una clausola introdotta nell'Editto da Salvio Giuliano eliminò questa stortura (...)."

19 This raises problems when the grandfather dies: Do the children become *sui iuris* or do they get in the power of their (natural) father? On this see A.M. Rabello, Effetti personali della 'patria potestas', Milano 1979, 309–313.

20 Inter alia: G. Mandry, Das gemeine Familiengüterrecht mit Ausschluss des ehelichen Güterrechts, Tübingen 1876, 197–198; details in Rabello (note 19) 181–187.

21 The best description can be found in J.F. Gardner, Family and Familia in Roman Law and Life, Oxford 1998, 6–15.

Leaving the grandsons in the parental power does not contradict this intention: In fact, it is in the son's interest that his own sons stay within the family and get their share as *sui heredes* of the grandfather[22]. This is true for both the *ius civile* and the *ius honorarium* since the *sui heredes* are not only legitimate heirs but are also among the first to be granted *bonorum possessio*. Economically speaking, leaving his children with his father could be insurance for the emancipated son: Even if his business is unsuccessful, his children will be safe, as they will still be entitled to a part of the grandfather's estate. Yet, as already mentioned, the prior admission of the emancipated son stands in their way here. It seems to be important to consider the conditions, under which the children must be entitled to claim *bonorum possessio*, if they want to benefit from the new Julian edict.

1.3. The conditions

The children left under power are admitted to the succession under two conditions: The first one is described by Pomponius with the words *si ad eos hereditas suo nomine pertinebit*, the second *neque nominatim exheredes scripti erunt*. This second requirement, according to which children cannot benefit from the edict if they have been disinherited, is not surprising[23]. As a principle *bonorum possessio* will not be granted to the *exheredatus*. In this respect, the praetor preserves the testamentary will, even if the *bonorum possessio* is against the testament or without (valid) testament:

> D. 37.4.10.5 Ulp. 40 ad ed. *Exhereditati liberi quemadmodum edictum non committunt, ita nec commisso per alios edicto cum illis venient ad bonorum possessionem unaque eis querella superest, si de inofficioso dicant.*
> 'Disinherited children, insofar as they do not set in motion the edictal procedure, in the same way, if others initiate it, will not come into bonorum possessio with those others; and their only remedy is the complaint, if they enter suit concerning an undutiful will.'

It is more difficult to interpret the first condition *si ad eos hereditas suo nomine pertinebit* since it is quite unclear to which word *suo nomine* refers to. The natural grammatical translation would be to link *suo nomine* to *quis ex his*, i.e. the *emancipatus*. In this case the translation reads: provided that the estate shall belong to them in his name. The opposite point of view can be found in the English

22 For details see Gardner (note 21) 15–20.

23 On this see also B.W. Leist, Die Bonorum possessio. Ihre geschichtliche Entwicklung und heutige Geltung, II, Göttingen 1948, 158–159.

translation (edited by Watson) of Ulpian's fragment and in the old German translation by Sintenis: 'wenn denselben die Erbschaft für sie selbst zufallen wird.[24]'

In my opinion, only the first translation can be said to be correct. Even if the possibility that *suo nomine* may be a reference to *eos* or *liberis*, the children themselves cannot be definitely excluded. It must be kept in mind, that as a reference to the *liberi* it would be an improper use of the reflexive pronoun. And there is no legal use for this. Regarding the translation 'in his name', two meanings are possible: The first one is to treat the edict *de coniugendis* as a special case of *bonorum possessio commisso per alium edicto*, the second to comprise all kinds of *bonorum possessio ab intestato* and *contra tabulas* within the edict *de coniugendis*.

1.3.a. Bonorum possessio commisso per alium edicto

The first interpretation, already discussed in the 19th century, is to link the said edict with the *bonorum possessio commisso per alium edicto:* According to this understanding, as the children's *bonorum possessio* is said to depend on their father's right to *bonorum possessio*, they are accessory claimants of their father's *bonorum possessio*[25]. The main idea of *bonorum possessio commisso per alium edicto* is to treat all children of the deceased equally under praetorian law. However, that it is difficult to preserve. Their equality is shown by the following text:

> D. 37.4.3.11 Ulp. 39 ad ed. *Si quis ex liberis heres scriptus sit, ad contra tabulas bonorum possessionem vocari non debet: cum enim possit secundum tabulas habere possessionem, quo bonum est ei contra tabulas dari? Plane si alius committat edictum, et ipse ad contra tabulas bonorum possessionem admittetur.*
> 'If one of the children has been appointed heir, he must not be called to *bonorum possessio* contrary to the terms of a will; for when he can have *possessio* in accordance with the will, what advantage is there to him in being granted it contrary to the terms of a will? Obviously, if another initiates the edictal procedure, he too will be admitted to *bonorum possessio* contrary to the will.'

24 C.E. Otto, B. Schilling, C.F.F. Sintenis, Das Corpus juris civilis ins Deutsche übersetzt ..., Leipzig 1830–1833. See the translation of D. 37.8.1pr. Ulp. 40 ad ed. 'if the estate shall belong to them in their own name'. A correct translation can be found in D. 38.6.5pr. Pomp. 4 ad Sab., also translated by S. Jameson (Digest [note 12]): 'provided that the estate shall belong to them in his name'.

25 For details see Leist (note 23) 138–153.

Ulpian starts with an evident assumption. This is that children, who have been appointed heirs, cannot claim *bonorum possessio* against a testament in their favour. However, the second part of Ulpian's argumentation is less evident. He states that, whenever the edict applies to another person, who claims *bonorum possessio*, the *liberi*, i.e. the children of the deceased will take part in the *bonorum possessio*. This means that they would profit from the *bonorum possessio commisso per alium edicto*. This argument might be interesting if the child has been appointed heir to a lesser share than the one *ab intestato*. Nevertheless, even if the child loses the advantages of the institution of *bonorum possessio*, it will still be applied to all the children on the demand of one, e.g. the one who has been passed over.

The only exception to the equal treatment of all children is the disinherited child: That child will not share the inheritance, neither under civil nor under praetorian law. The main argument for this exception and the principal argument for the rule of *bonorum possessio commisso per alium edicto* is a comparison to the situation of the *bonorum possessio ab intestato*: In case the deceased did not leave a valid testament, all children are entitled equally with exclusion of the disinherited children.

Yet, according to the said edict children have a proper right to claim *bonorum possessio* and the reason for this can be found in civil law, i.e. their status as *sui heredes* and not *bonorum possessio ab intestato*. Moreover, the children also receive an equivalent right under the edict *de coniugendis*. By contrast, the edict *commisso per alium edicto* only offers an accessory position. Hence, the edict *de coniugendis* is not to be reduced to the *bonorum possessio commisso per alium edicto*[26], but it covers also the direct *bonorum possessio contra tabulas* and *bonorum possessio ab intestato,* provided that the (emancipated) father is entitled to claim it.

1.3.b. successio in locum

The meaning of the condition 'shall belong to them in his name' must be connected to the *per stirpes* rule, which applies to the civil heir as well as to the praetorian one.

With regard to civil law, the rule is attested by the following fragment:

> Coll. 16.2.2 = Gai. inst. 3.2 *Sui autem heredes existimantur liberi qui in potestate morientis fuerunt, veluti filius filiave, nepos neptisve ex filio, pronepos proneptisque ex nepote filio nato prognatus prognatave. Nec interest naturales sint liberi an adoptivi. Ita demum tamen nepos neptisve et pronepos proneptisve suorum heredum numero sunt, si praecedens persona desierit <in potestate parentis esse, sive morte id acciderit> sive*

26 Same opinion Leist (note 23) 159.

alia ratione, veluti emancipatione. Nam si per id tempus, quo quisque morietur, filius in potestate eius sit, nepos ex eo suus heres esse non potest.
'Are reckoned *sui heredes*, as we have said above, children who were in the *potestas* of the deceased when he died, such as a son or daughter, a grandson or granddaughter by a son, a great-grandson or great-granddaughter by a grandson by a son, and it makes no difference whether they are natural or adoptive children. A grandson or granddaughter, however, or a great-grandson or great-granddaughter, is in the class of *sui heredes* only, if the preceding person has ceased to be in the ancestor's *potestas*, whether owing to death or in some other way, as by emancipation. For if at the time of a man's death his son is in his *potestas*, his grandson by that son cannot be a *suus heres*.'

The same principle applies to the *bonorum possessio*, the praetorian law of succession, as Pomponius tells us in:

D. 38.6.5.2 Pomp. 4 ad Sab. *Si filius emancipatus non petierit bonorum possessionem, ita integra sunt omnia nepotibus, atque si filius non fuisset, ut quod filius habiturus esset petita bonorum possessione, hoc nepotibus ex eo solis non etiam reliquis adcrescat.*
'If an emancipated son has not applied for *bonorum possessio* the grandson's rights all remain intact, just as if the son had not been alive, so that what the son would have taken, had he applied for *bonorum possessio* falls only to those grandsons of whom he is the father and does not also accrue to the others.'

Both texts indicate the essence of the rule: On the one hand, the *per stirpes* rule means that the following children, in our case the grandchildren, are represented by their father and do not take part in the share of the estate if their father is alive and claims his right. On the other hand, the *per stirpes* rule allows grandchildren to take their father's share of the inheritance if he is dead or excluded for other reasons. Such reasons might be emancipation under the civil law (Gai. 3, 2) or refusal of claim under the praetorian law (D. 38.6.5.2 Pomp. 4 ad Sab.). In both cases, the grandchildren get the inheritance together with their aunts and uncles in their father's place. This point of view is also valid for the position of the grandchildren left in their grandfather's power:

D. 37.8.1.1 Ulp. 40 ad ed. *Hoc edictum aequissimum est, ut neque emancipatus solus veniat et excludat nepotes in potestate manentes, neque nepotes iure potestatis obiciantur patri suo.*
'This edict is indeed most equitable in that the emancipated son alone does not come into the estate and exclude grandsons in power, nor can the grandsons, in virtue of being in power, hinder their father's claim.'

Ulpian's praise of the edict stresses its equity. It restrains the father from hindering his children's ability to obtain the *bonorum posessio* and the children from excluding their father's claim 'in virtue of being in power'. This last expression demonstrates that the edict *de coniugendis* protects the children, as they are *sui heredes*. As such they could prevent their father from obtaining the estate, but if he obtains *bonorum possessio*, they are excluded because of the *per stirpes* rule.

The edict *de coniugendis*, insofar as it attributes *bonorum possessio* to both, father and children, attenuates the consequences of the *per stirpes* rule. However, the *per stirpes* rule still applies insofar, as they cannot get *bonorum possessio* to the detriment of the other (praetorian) heirs. Additionally, according to this interpretation the children take part in the father's share, which is expressed by the words *suo nomine*. This would mean that the children were entitled to participate in the sharing of the estate as *sui heredes* after their father's death or their emancipation, meaning that they actually take part in the praetorian succession.

In some way, the *edict de coniugendis* should be read together with Coll. 16.2.2 = Gai. inst. 3.2, which tells us, that 'a grandson or granddaughter... is in the class of *sui heredes* only if the preceding person has ceased to be in the ancestor's *potestas*.' This description can be said to be a synonym of *si ad eos hereditas suo nomine pertinebit*, provided, that the estate belongs to them in their father's name. Before an in-depth examination of the new conflict, which arises between the father and his children due to their new position, can be made, the legal consequences must be briefly dealt with.

1.4. The consequences

According to Pomponius' words, the consequences are: *ut ex ea parte dimidiam habeat, reliquum liberi eius, hisque dumtaxat bona sua conferat*, which means that the emancipated son has to divide his share with his children as well as contribute his property to the children (*collatio bonorum*). It can be easily understood that the division of the inheritance among the heir and his children constitutes a loss for the emancipated son. This loss may be substantial if the grandfather's inheritance was that of a rich man. By contrast, the loss suffered can partly be compensated by the new rule of *collatio bonorum: Collatio bonorum*, in principle, means the obligation of the emancipated child to contribute to the estate with his own property. The situation is as follows: As the emancipated child had time to acquire property for

himself (and not for the father), it is said to be just (by Ulpian), that the emancipated child should 'throw' his estate into the inheritance[27]. In this way, all the property that has been gained either by their father or their brother will be divided.

For example, assume that the inheritance is worth 120,000[28]. There are two sons, who stayed in the power of the deceased and there is one emancipated brother, who 'throws' in his estate, which is worth 30,000. Just as the father's estate, the *emancipatus'* estate will be divided into three parts, so that each of the sons gets 40,000 + 10,000 (a total of 50,000). For the *emancipatus*, who already got 30,000, this is not a great gain. However, this rule is very profitable for his brothers. This advantage of the *sui heredes* becomes even more obvious the higher the number of emancipated sons gets. For every emancipated child has to contribute to the children-in-power but does not participate in the *collatio bonorum* of the other emancipated children.

The edict *de coniugendis cum emancipato liberis eius* modifies these rules in cases, when the emancipated son has children (grandchildren) left in the power of the grandfather. In that case, he only has to contribute to them. This might be an advantage if he has fewer children than siblings and if he is richer than his father[29]. Supposing there is one grandson left behind and beside him one other son, not emancipated. If the *emancipatus*, who has been passed over, claims *bonorum possessio*, the grandson and the son, if they have not been disinherited, participate in the distribution of the grand-father's estate, because they are also *liberi* and – according to the said edict – the grandson is joined to his father. Hence, the grandfather's property has to be divided in two parts, one for the *filius*, the other for the emancipated son and his child. As always, the emancipated son does not get *bonorum possessio* if he does not contribute his estate. However, since the *edict de coniugendis* applies, he only contributes to his own son. As a consequence, he keeps a greater share as he only contributes to his children and not to his brothers and sisters. Economically speaking, this system is wise since, the more the emancipated son gained as a *sui iuris*, the more he will benefit from this kind of distribution.

Altogether, the intention of the legislator to give consideration to all the interests involved can be identified. On the one hand, the grandchildren get a share of the inheritance which they would usually be excluded from. This new division

27 On collatio bonorum see D. 37.6. Ulpian's words can be found in D.37.6.1pr. Ulp. 40 ad ed. *Hic titulus manifestam habet aequitatem: cum enim praetor ad bonorum possessionem contra tabulas emancipatos admittat participesque faciat cum his, qui sunt in potestate, bonorum paternorum: consequens esse credit, ut sua quoque bona in medium conferant, qui appetant paterna.*

28 Another example is D. 37.6.3.2 Iul. 23 dig.

29 On the advantages of the edict for the son see Moriaud (note 14) 211–212. On *collatio bonorum* under the edict *de coniugendis* see also Caballé Martorell (note 9) 145–153 and A. Guarino, Collatio bonorum, Roma 1937, 80–83.

consists of the emancipated son's sharing his part and his property with his own children. He is however freed from the obligation to share with all his siblings in return. On the other hand the brother-in-power and all other children left in-power of the father keep their share, even if the emancipated son and his children take part in the inheritance. And, finally, the emancipated father is not excluded by his children.

After this brief analysis of the edictal announcement, I would like to focus on the deadlock situation that would exist between *emancipatus* and his children without the *nova clausula Iuliani.*

2. The deadlock situation between the *emancipatus* and his children

There have been some attempts in research to interpret the edict *de coniugendis* within the edictal system of *bonorum possessio*[30]. The edict is said to be in the interest of the siblings of the emancipated son, who would have to bear a loss, if the emancipated son and his children participated with more than one share in the division of the inheritance[31]. Others stress the benefit for the children, who would be excluded from *bonorum possessio* by their father[32]. Yet others doubt if the children were really excluded by the emancipated son even before the introduction of the *clausula Iuliani*[33]. In my analysis I would like to start with Ulpian's commentary on the edict, in particular with his appraisal of the edict as most equitable, D. 37.8.1.1 Ulp. 40 ad ed.

According to Ulpian, the *aequitas* of the edict lies in its *equilibrium* between two colliding interests. On the one hand, there is the emancipated son, who excludes his sons from *bonorum possessio* because of *ordo successionis*. On the other hand, there are his children left in-power, who could hinder his claim *iure potestatis*. Whereas the exclusion of the children by their father is quite obvious[34],

30 A good overview of former interpretations can be found in Burillo (note 8) 207–215. But Burillo's own argument does not take into account the *laudatio edicti* by Ulpian, since in his opinion all *laudationes edicti* are spurious (SDHI 31 (1965) 208). For counter-arguments against this general suspicion of the *laudatio edicti* see U. Babusiaux, Zur Funktion der *aequitas naturalis* in Ulpians Ediktslaudationen, in: Testi e problemi del giusnaturalismo, D. Mantovani, A. Schiavone (edd.), Pavia 2007, 603–644.

31 R. Sohm, L. Mitteis, L. Wenger, Institutionen. Geschichte und System des römischen Privatrechts, München/Leipzig 1923[17], 576–577.

32 Especially Leist (note 23) 155–156 and Moriaud (note 14) 205: "l'édit assure une part à l'enfant".

33 Moriaud (note 14) 207–208.

34 It has already be mentioned that the children can be excluded by their emancipated father, because the praetor considers him amongst the *liberi* in the sense of the edict, which excludes the persons in his branch. The Digest contains many cases and border cases that are heavily discussed amongst jurists, on the question whether the children are excluded or not. Consider the following examples: If the emancipated father has been deported, according to Ulpian, the son can no longer exclude the grandson, as he has to be treated as dead (D. 37.4.1.8 Ulp. 40 ad ed.). Another

little is said about the children hindering their father's claim. *Ius potestatis* alludes to their position as *sui heredes*, once their father has left the family by emancipation. As a consequence, the situation must be considered, in which *sui heredes*, who might even be appointed as testamentary heirs, are confronted with a claim of *bonorum possessio contra tabulas* because the emancipated son has been passed over. This conflict between civil heir and *bonorum possessio* is discussed in the categories of *bonorum possessio sine* and *cum re*[35].

2.1. The difference between bonorum possessio sine *and* cum re

Bonorum possessio sine re is a formal attribution of the praetorian right without protection against *petitio hereditatis*. By contrast, the *bonorum possessio cum re* helps the *bonorum possessor* to obtain a possession of the estate that he can defend even against the civil heir. In the discussed context, it is noteworthy that the terminology of *bonorum possessio cum re* and *sine re* is used each time where there is a conflict between a civil and a praetorian heir. The problem is that general information about this kind of conflict are scarce, for Justinian eliminated most of the differences between *bonorum possessio* and civil law. Therefore, the sources lie outside the Digest. The most complete text derives from Gaius' Institutiones. He cites cases in which the civil heir prevails, i.e. the *bonorum possessio sine re*:

> Gai. inst 3.35–37: 35. *Ceterum saepe quibusdam ita datur bonorum possessio, ut is, cui data sit, non optineat hereditatem; quae bonorum possessio dicitur sine re.*
> 36. *Nam si uerbi gratia iure facto testamento heres institutus creuerit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo, quod iure ciuili heres sit, nihilo minus ii, qui nullo facto testamento ad intestati bona uocantur, possunt petere bonorum possessionem; sed sine re ad eos [hereditas] pertinet, cum testamento scriptus heres euincere hereditatem possit.*
> 37. *Idem iuris est, si intestato aliquo mortuo suus heres noluerit petere bonorum possessionem, contentus legitimo iure. nam et agnato competit quidem bonorum possessio, sed sine re, quia euinci hereditas a suo herede potest. et illud conuenienter dicetur: si ad agnatum iure ciuili pertinet hereditas et is adierit hereditatem, sed bonorum possessionem petere noluerit, et si quis ex proximis cognatis petierit, sine re habebit bonorum possessionem propter eandem rationem.*
> 35. 'Frequently, however, *bonorum possessio* is granted in such circumstances that the grantee does not get the inheritance. Such *bonorum possessio* is called *sine re* (ineffectual).'
> 36. 'For instance, if an heir instituted by a properly executed will makes *cretio*, but chooses not to apply for *bonorum possessio secundum tabulas*, being satisfied with being heir at civil law, those called to the succession on intestacy can apply for *bonorum possessio* nonetheless; but it goes to them *sine re*, since the testamentary heir can evict them from the inheritance.'
> 37. 'The law is the same where in a case of intestacy the *suus heres* does not choose to apply for *bonorum possessio*, being satisfied with his statutory right: if this happens, *bonorum possessio* is open to the agnate, but *sine re* since he can be evicted from the inheritance by the *suus heres*. In like manner, if an inheritance goes to an agnate by civil law and he enters upon it, but does not choose to apply for *bonorum possessio*, and then one of the nearest cognates applies for it, the latter will have a *bonorum possessio sine re*, for the same reason.'

In chapter 36 the civil heir, who had been appointed by testament and who had formally accepted inheritance, chose not to claim *bonorum possessio*. If members of the family who are entitled to claim *bonorum possessio ab intestato*, claim their praetorian right, *possessio* will be granted to them *sine re* since (as Gaius points out): *testamento scriptus heres evincere hereditatem possit* ('the testamentary heir can evict them from the inheritance').

The situation is similar in chapter 37 where the civil heir, a *suus*, who took the inheritance *ab intestato*, chose not to claim *bonorum possessio ab intestato* but to content with the civil law. According to Gaius, if others, e.g. agnates, claim *bonorum possessio ab intestato*, they will be accepted but only *sine re*. The reason for this is the same as before: *quia evinci hereditas a suo herede potest* (since he can be evicted from the inheritance by the *suus heres*). Yet, there is another

example could be the emancipated father, who has been adopted by another family. Different jurists discuss, whether the emancipated father excludes his son left in his original family and if he is emancipated by the adoptive father. What if the emancipated father has been disinherited? Does he still exclude his children, so that nobody of this branch will get a share of the estate? Or do they take his place within their father's family? How about a grandson who was adopted by the grandfather as a son? Does the natural father, who legally is the brother of the child exclude him from bonorum possessio? The edict *de coniugendis cum emancipato liberis eius* does not deal with all these questions but constitutes a valuable help for the most important case, where the children and the *emancipatus* get in rivalry as one has been passed over and the other has been instituted heir. Moreover, as will be pointed out at a later stage, the Roman jurists use the edict as a basis of an analogy for some of the cited cases. Their interpretation will be helpful in finding answers to all these cases. However, the *nova clausula* is always a useful tool.

35 It was Moriaud (note 14) 208–211, who rightly made clear that before the edict *de coniugendis* the conflict between the emancipated father and the children left in the power of their grandfather was not necessarily resolved in favour of the emancipated son.

situation in this very chapter. An agnate has taken the inheritance without testament according to the civil law but did not claim *bonorum possessio ab intestato*. A cognate, who may claim *bonorum possessio ab intestato*, will only be admitted *sine re*. In all these cases the praetor grants *bonorum possessio* but without having an effect on the civil heir. In this case, the *bonorum possessor* is reduced to a formal position (which might be useful nonetheless, e.g. against third persons). But, as Gaius makes clear, there are also cases in which the *bonorum possessio* is *cum re*, even against the civil heir:

> Gai. inst. 2.125 *Quid ergo est? licet hae secundum ea, quae diximus, scriptis heredibus dimidiam partem modo detrahant, tamen praetor eis contra tabulas bonorum possessionem promittit, qua ratione extranei heredes a tota hereditate repelluntur et efficiuntur sine re heredes.*
> 'But there is more to be said. For though, according to our statement, such persons deprive the testamentary heirs of only half, nevertheless the praetor promises them *bonorum possessio contra tabulas*, and in this manner the strangers heirs are excluded from the entire inheritance and become heirs without effect (*sine re*).'

In the passage above, Gaius tells us that the effects of *bonorum possessio contra tabulas* depend on the instituted heir. If the appointed heirs are *sui heredes*, the child passed over will only get his share. But if the testamentary heir was an *extraneus*, a stranger, the child will get one half of the estate. This is the situation under the *ius civile*. But the praetorian law goes beyond this: According to Gaius 'such persons deprive the testamentary heirs of only half, nevertheless the praetor promises them *bonorum possessio contra tabulas*, and in this manner the heirs, which are strangers, are excluded from the entire inheritance and become heirs only in name (*sine re*)'. Thus, the praetor does not respect the civil heir in this case.

2.2. Conclusions for the situation between emancipatus *and his children*

If these insufficient criteria are applied to the said problem, i.e. to the situation between the emancipated son and his children left in-power, it has to be pointed out that the children do not always, but only under certain circumstances, hinder their father's claim. The criterion for defining if there is loss or gain of the inheritance, could be the type of *bonorum possessio* applied. If it is *bonorum possessio ab intestato*, the *sui heredes* seem to be in a better position than if the father is claiming *bonorum possessio contra tabulas*.

The second argument is the status: family heir or not. This argument relates to the position of the children as *sui heredes*: As *sui heredes* they are the legitimate successors of the deceased and they receive the inheritance without any accession formalities. Therefore, it is the father, who has to bring his claim, especially if he

is claiming *bonorum possessio contra tabulas* (D. 38.6.2 Iul. 27 dig.). If he did not apply for it in due time, he will be excluded. The following extract indicates how Julian describes the said situation:

> D. 38.6.2 Iul. 27 dig. *Emancipatus praeteritus si contra tabulas bonorum possessionem non acceperit et scripti heredes adierint hereditatem, sua culpa amittit paternam hereditatem: nam quamvis secundum tabulas bonorum possessio petita non fuerit, non tamen eum praetor tuetur, ut bonorum possessionem accipiat unde liberi.* (...)
> 'If the emancipated son, who had been passed over, did not claim the *bonorum possessio* against the terms of a will and if the appointed heirs have taken the estate, he has lost his inheritance from his father through his own fault; for although no application has been made for *bonorum possessio* according to the terms of a will, nevertheless, the praetor will not protect him to the extent of granting him *bonorum possessio unde liberi.* (...)'

What is important for our purpose is that there are cases in which children left in-power effectively hinder their father's claim or – if he is granted *bonorum possessio sine re* – its effectiveness. This leads me to the conclusion that the situation before the Julian edict was probably neither clear nor satisfactory. In some cases, notably when the deceased grandfather did not leave a testament, the children prevailed against their emancipated father. However, the situation was probably different in the case of *bonorum possessio contra tabulas*. It might be possible that in this case the emancipated son prevailed against his children if he had been passed over and had them appointed heirs or even passed them over as well. Hence, before this amendment which is said to be an invention of Julian, the distribution of the estate among grandchildren in power and the emancipated son, their father, depended on coincidences and chances. This was mostly due to the unsolved conflict between civil and praetorian law. And this conflict was a deadlock situation since neither system could take into account the position granted in the other system[36]. If we accept these main elements of this reconstruction, we can try to rate the success of the Julian invention.

3. A turning point?

In respect thereof, the technique Julian chose to solve the conflict will be examined first. This is the technique of *coniunctio*. Here, the children left in the power of the grandfather and the emancipated son are treated as heirs to the same

36 A discussion of the chronological development of the praetorian rule can be found in Gardner (note 21) 24–46.

share. This means that when both are alive, they have to divide the inheritance. However, if one heir dies, the other automatically receives the share of the deceased heir. It is called *accretio* and it works, even if there are other *sui*.

3.1. The technique of coniunctio

This technique of joining two entitled heirs in their share (*pars*) is not new. One brief example can be taken from Celsus, who said:

> D. 32.80 Cels. 35 dig.[37] *Coniunctim heredes institui aut coniunctim legari hoc est: totam hereditatem et tota legata singulis data esse, partes autem concursu fieri.*
> 'Appointing heirs jointly or leaving legacies jointly means that the whole inheritance and the whole of the legacies are given severally but shared concurrently.'

He makes it clear that the heirs who have been appointed jointly, are not obliged to take part in the inheritance together, therefore the participation of one heir is not a requirement for the other heir to take part. However, if they do take part together, they must share the inheritance. This means that if one of two heirs dies or is not willing to take the inheritance, the other receives the respective share by the right of accretion. The *coniunctio* is a well-established technique in civil law. However, in joining the emancipated son to his children who are in-power of his father, Julian transferred the technique onto a context where it has not been applied before. Indeed, there are not two or more civil heirs. However, in the examined situation civil heirs (the children as *sui heredes*) and one praetorian heir (the emancipated son) are in view. Additionally, they are joined with regard to these two different entitlements[38]: As already mentioned, *suo nomine* in Pomponius' commentary on Sabinus refers to the civil law of the children to get the inheritance as *sui heredes*, whereas the emancipated son can only claim *bonorum possessio* regardless of the sources of the law of succession. To be very clear: It is not shocking that the edict respects civil law – as the praetor is in the service of the *ius civile*. The interesting part here is the explicit conjunction of the civil heir to the praetorian one, as if both titles were equal or exchangeable.

37 On the text and *coniunctio* in general see P. Bonfante, Corso di diritto romano, Vol. 6: Le successioni, parte generale, Milano 1974, 331–332; P. Voci, Diritto ereditario romano. Parte generale, Milano 1960, 724.

38 Clear proof of this technique is D. 38. 6.5.2 Pomp. 4 ad Sab. *Si filius emancipatus non petierit bonorum possessionem, ita integra sunt omnia nepotibus, atque si filius non fuisset, ut quod filius habiturus esset petita bonorum possessione, hoc nepotibus ex eo solis non etiam reliquis adcrescat.*

This result contrasts with the prevailing opinion and the original situation in Roman Law where the *bonorum possessio* and *hereditas* were considered to be two separate things[39]. Indeed, the *clausula nova* shows us, that because of practical grounds and reasons of equity the civil law of succession could already in classical times have been joined to the praetorian law of succession. How could Julian transgress these traditional limits?

3.2. Views of Romanists

The question of the connection between civil and praetorian law is a question of the ideological background of the *nova clausula*. There are two kinds of answers. The first is related to the growing autonomy of the emancipated sons. The second deals with the codification of the edict. In 1910 Paul Moriaud analysed what he called the 'simple paternal family', i.e. the blood ties that exist between the emancipated son and his children[40]. In this view, the edict *de coniugendis cum emancipato liberis eius* is a further step to recognise this concept of family, as it takes into account the fatherly rights of the emancipated son. A similar claim is made by Letizia Vacca, who stated that all the edicts on *bonorum possessio* aim at protecting the cognates, i.e. the relatives by blood, instead of the agnatic family[41]. It cannot be denied that the protection of the emancipated son is aimed at protecting the cognate family and in particular the families linked from the father's side. Yet, this is common for the praetorian law of succession in general.

With respect to the discussed edict in particular, it was Biondi, who pointed out, that the codification of the praetorian edict marked an important step in the development of the *bonorum possessio*[42]. He thought of a change insofar, as the rivalry between civil heir and praetorian possessor would no longer be decided by the individual magistrate in ruling on a case to case basis but by the edict and the following cases. I think that Biondi is right. Still, I would like to enhance both of his arguments by looking at the use and the interpretation of our edictal section performed by jurists after Julian.

39 B. Biondi, Diritto ereditario romano. Parte generale, Milano 1954, 134–139.

40 Moriaud (note 14) esp. 204– 212, on this see the critical remarks of J. Partsch, Rezension Paul Moriaud, De la simple famille paternelle en droit romain, Genève 1910, ZRG rom. Abt. 45 (1911) 443–444, who agrees on the concept of 'simple paternal family' for the edict *de coniugendis*. In the same direction but with new arguments see Gardner (note 21) 39–40, 44–46: "The effect of the changes in the edict was to allow these family feelings some additional protection and support, which could be invoked if needed."

41 L. Vacca, In tema di bonorum possessio contra tabulas, BIDR 80 (1977) 174–175.

42 See Biondi (note 39) 140–142.

3.3. The edict as an argument by analogy

To analyse the problem, the reader has to return to the source which is described at the beginning of this essay, i.e. Marcellus in his ninth book of his digests. As in many other sources, Marcellus does not apply the edict *de coniugendis* directly but as an argument for analogy:

> D. 37.8.3 Marcell. 9 dig.[43] (a) *Qui duos filios habebat, alterum ex his emancipavit, nepotem ex eo in potestate retinuit: emancipatus filium sustulit et a patre exheredatus est:*
> (b) *quaero, cum frater eius et ipse emancipatus praeteritus sit et nepotes ex emancipato filio ab avo heredes instituti, quid de bonorum possessione iuris sit? Et quid intersit, si emancipatum quoque, ex quo nepotes erant nati, praeteritum esse ponamus.*
> (c) *Respondi, si filium retento ex eo nepote emancipaverit et emancipatus procreaverit filium et heres uterque nepos institutus fuerit, pater eorum exheredatus, alius filius praeteritus: solus filius praeteritus bonorum possessionem contra tabulas petere poterit: exheredatus enim obstat filiis suis post emancipationem susceptis.*
> (d) *Nepoti tamen retento in potestate bonorum possessio dari debet, quoniam, si pater eius emancipatus praeteritus esset, simul cum eo bonorum possessionem accipere posset propter id caput edicti, quod a Iuliano introductum est, id est ex nova clausula, nec debet deterioris esse condicionis, quia pater eius exheredatus sit.*
> (e) *Idque ei praeterito quoque praestari oportebit.* (...)
> (a) 'A man had two sons and emancipated one, but kept a grandson, of whom the latter was the father in power; the emancipated son acquired [another] son, and was disinherited by his father;'
> (b) 'I ask: Since the emancipated son's brother, himself likewise emancipated has been passed over and the grandchildren descended from the emancipated son have been instituted heirs by their grandfather, what is the law concerning *bonorum possessio*? And what difference does it make, if we suppose that the emancipated son, too, who was father of the grandchildren, was passed over?'
> (c) 'I have given it as my opinion that if the testator has emancipated his son, while keeping in his power the grandson of whom that son is the father, and the emancipated son has produced a son and both grandchildren have been instituted heirs, while their father has been disinherited, and another son has been passed over, only the son that has been passed over will be able to apply for *bonorum possessio* contrary to the terms of a will; for a son that has been disinherited *impedes* the claims of his sons begotten after emancipation.'
> (d) 'But *bonorum possessio* ought to be given to the grandson kept in power since, if his emancipated father had been passed over, he could take *bonorum possessio* together with him under this head of the edict, which was introduced by Julian, that is, in accordance with the new section; and he should be in no worse position because his father has been disinherited.'
> (e) 'And the benefit of the section will have to be accorded him in the case where he, too, has been passed over. (...)'

43 On (exaggerated) criticism of the text see Cosentini (note 9) 220–221 and R. Reggi, Note anonime ai Digesta di Marcello, Studi Parmensi IV (1953) 56–57.

First, a brief summary of the facts (letter a): The grandfather had two sons, one of whom was emancipated and had a son, whom the grandfather kept in his power. The second son may be emancipated as well. However, more importantly, the first son, who has been emancipated, had another son after the emancipation. This second son has never been in-power of his grandfather. The grandfather dies and leaves a testament. According to his last will, the two grandsons become heirs; their father, his emancipated son, is disinherited, and the other son is passed over. Marcellus asks: (letter b) *quid de bonorum possessione iuris sit? Et quid intersit, si emancipatum quoque, ex quo nepotes erant nati, praeteritum esse ponamus.* What about the *bonorum possessio*? and: does it make a difference if the emancipated son has been passed over, too?) With these questions Marcellus focuses on the main problem. Although *bonorum possessio contra tabulas* is available to the son who has been passed over and *commisso per alium edicto* is available to others, does that mean that the grandsons, who were in the power of the grandfather, but whose father has been disinherited, can get their uncle's *bonorum possessio*?

Marcellus' reply (letter c) lists again all the relevant facts, i.e.

— the emancipation of the son while keeping the grandson in power;
— the birth of the second grandson after the emancipation;
— the father's disinheritance;
— and the passing over of the other son.

He concludes that only the son who has been passed over, can get *bonorum possessio contra tabulas*, whereas the grandsons may not benefit from their uncle's right since their father has been disinherited and this impedes their claim as well.

But Marcellus has not yet finished his analysis, as he goes on (still letter c): 'But *bonorum possessio* ought to be given to the grandson kept in power...'. This

way, Marcellus quotes the new edict and creates a hypothetical case, in which not the uncle but the father of the grandson has been passed over. In this case, as already seen, the child ought to be admitted together with his father. For Marcellus this case is comparable to the one, in which the uncle has been passed over and he assumes: 'and the son should be in no worse position because his father has been disinherited'[44]. As a consequence, Marcellus accepts the grandson's claim of *bonorum possessio* founded on the *nova clausula*[45], even if his father himself cannot get *bonorum possessio*[46].

I do not feel in the position to judge if this is an analogical application of the edict or just a wider comprehension of its wording. On the one hand, it is certain, that this case is not the original one for which the edict was designed, as it speaks about the father and the children to be joined together and not of the uncle and his nephews. On the other hand, the interpretation Marcellus gives to the edict is not astonishing when considering of the term *coniunctio* and its usual implications: The children and their father are joined but compete against each other, so that the children automatically get their father's share if he is excluded or disinherited[47].

So far enough about Marcellus' complex argumentation. There are many other texts in which later jurists take Julian's edict in order to grant *bonorum possessio* to grandchildren left in power, while the emancipated son cannot apply for *bono-*

44 The son who has been disinherited is to be regarded as dead (*pro mortuo habetur*) see Leist (note 23) 159 and note 14.

45 Cosentini considers this consequence erroneous and not attribuable to Marcellus, see Cosentini (note 9) 226–227: "Com'è noto, il nepos *in potestate*, invece, ha diritto alla *contra tabulas* per la condizione di favore fatta dal pretore ai *sui heredes* di accettare l'eredità *ex testamento* o di partecipare alla b.p.c.t. commisso per alium edicto." However Marcellus tells us, that the *bonorum possessio commisso per alium edicto* does not apply, since the son has been disinherited and thus also hinders the grandsons: *solus filius praeteritus bonorum possessionem contra tabulas petere poterit: exheredatus enim obstat filiis suis post emancipationem susceptis.*

46 The jurists accept to also help the grandsons in other cases, cf. D. 37.4.1.7 Ulp. 39 ad ed. (adoption and emancipation of the son); D. 37.4.3.7 Ulp. 39 ad ed. (death of the son before the inheritance). A rescript of Marc Aurel is said to have decided as Marcellus did: D. 37.8.4 Mod. 6 pandect.: *Emancipato quis filio retinuit ex eo nepotes in potestate: filius emancipatus susceptis postea liberis decessit. Placuit in avi potestate manentes simul cum his, qui post emancipationem nati sunt, decreto bonorum possessionem accipere, manente eo, ut, si velit avus sibi per nepotes adquiri, bona sua conferat aut nepotes emancipet, ut sibi emolumentum paternae hereditatis adquirant: idque ita divus Marcus rescripsit.*

47 And this is why Marcellus does not base the claim on the *bonorum possessio commisso per alium edicto* – it cannot apply because the father has been disinherited – but on the *nova clausula*. Under this section of the edict, the grandson's right to *bonorum possessio* is not linked to his father's right to *bonorum possessio* but to his position of being in his grandfather's power (*sui heres*). As Marcellus puts it: *Nepoti tamen retento in potestate bonorum possessio dari debet, quoniam, si pater eius emancipatus praeteritus esset, simul cum eo bonorum possessionem accipere posset propter id caput edicti, quod a Iuliano introductum est* (…).

rum possessio himself[48]. And behind the edict is always the idea to grant *bonorum possessio* to the grandsons because they are the *sui heredes*. Furthermore, it is noteworthy that the subsisting motive in all these cases is still the competition between civil and praetorian law which is unsolved in general. Additionally, every case can be more or less solved by using the Julian edict of 131 AD. Therefore, I would like to conclude by stating, that it might be possible that the *nova clausula Iuliani* represented a turning point in the history of the Roman law of succession. This is because it harmonises the different systems of succession in Roman law with regard to most evident conflict.

The general question in this essay also relates to the social change. I should think that this could include Moriaud's idea of the single patronal family. Roman families in the second century are no longer centred on one person, the *pater familias*, but have a more sophisticated structure, including emancipated children and their families[49]. The (new) law of succession is the result of this change.

In conclusion, these texts show the need to deal with far more complex family situations than ones with only one *pater familias*, who has the power over all his children and leaves his estate to them. Indeed, in all texts, children are emancipated, adopted as son or grandson, once more emancipated and adopted again. And family ties no longer depend on the *potestas* of one father but are shared among numerous fathers, including also previous natural ones. The *nova clausula Iuliani* reflects this change of paradigm in the Roman family and transfers it to a technical level by joining the emancipated son to his children. This is a clear contradiction to the separation between civil and praetorian law if not a new paradigm of a uniform law of succession.

Kuhn stated, that scientific revolutions occur, when scientists encounter anomalies which cannot be explained by the universally accepted paradigm[50]. They then have to find new paradigms. It could be that the joining of the emancipated father and his children in power of the grandfather constitutes such a shift of paradigm in Roman law since the old ones – *bonorum possessio* and legal succession – were of no help.

48 Cf. D. 37.4.1.7–8 Ulp. 39 ad ed.; D. 37.8.1.3 Ulp. 40 ad ed.; D. 37.8.4 Mod. 6 pandect.; D. 37.8.7 Tryph. 16 disp. These cases mainly deal with adopted children or children born to the emancipated son after his emancipation. For some cases see Vacca (note 41) 176–178, who speaks of "un'applicazione un po' forzata della clausola". The analogy is rejected in D. 37.4.13.1 Iul. 23 dig.

49 This includes that the father will inherit from the emancipated son (and enters into competition with the grandsons), cf. D. 37.6.5pr. Ulp. 70 ad ed., where a rescript decides that the grandfather has to bring his own property into hotchpot.

50 Kuhn (note 3) 62–65.